The defendant has also argued that the plaintiff was in breach of the said agreement due to her failure to comply with the demand of the defendant to pay the balance of the purchase price for $17,907.20 AB23. This is pleaded in paragraph 12 of the defence. And under Clause 21 of the said agreement, if the purchaser shall fail to pay any instalment of the total purchase price or any part thereof, or any interest, then it shall be lawful for the vendor at any time thereafter to annul the sale and forthwith terminate the agreement. With respect, although this was pleaded in the defence, there was no evidence that the defendant had taken any positive steps to terminate the agreement. However, it was only about three months after the writ was filed and served on the plaintiff that the defendant's solicitors wrote to the plaintiff terminating the said agreement. This letter dated January 26, 1978 was not agreed by parties, but was only included in the defendant's bundle of documents. No witness was called to produce this letter. Be that as it may, from counsel's submission, I am of the view that the defendant did not take up this point seriously. What they are contending now is that the plaintiff's conduct by refusing to pay the last balance amounted to rescission of the said agreement. It is my finding that the failure on the part of the plaintiff to pay the balance does not amount to a repudiation of the contract. The reply by her AB26 to the defendant's letter of demand AB23 cannot be construed as her intention to repudiate. What she wanted to do was merely to set-off the amount she was entitled to as liquidated damages against the balance of the purchase price due to the defendant. At any rate, the defendant has not pleaded that the plaintiff has repudiated the contract or that the defendant has accepted the repudiation. "The act and conduct of the defaulting party relied on as amounting to a repudiation of the contract should be clearly pleaded and it is necessary to plead and prove that the repudiation was accepted.". *Bullen Leake & Jacob's* Precedents of Pleadings, 12th Edition, p. 352.

The plaintiff also claims for loss of use and enjoyment of the said building by way of rental at $2,400 per month from June 16, 1977 to the date of delivery of vacant possession. With regard to the rental, the plaintiff said in her evidence that she enquired from the developers' office in Kuala Lumpur and was informed that the rental would be $2,500 per month. The plaintiff did not call other witnesses or produce any document to substantiate her claim. The onus of proving her loss rests with the plaintiff. "Plaintiffs must understand that if they bring actions for damages, it is for them to prove their damages; it is not enough to write down particulars, and, so to speak, throw them at the head of the court, saying: 'This is what I have lost, I ask you to give me these damages'. They have to prove it" *per* Lord Goddard C.J. in *Bonham-Carter* v. *Hyde Park Hotel.*[7] The same observation was made by Thomson L.P. in *Sum Kum* v. *Devaki Nair & Anor.*[8]

In the circumstances, the plaintiff has failed to prove her loss of use and occupation of the said building by way of rental. Therefore with the exception of her claim for the loss of use and occupation of the said building, I allow the plaintiff's claim for the sum of $9,919.46 being the balance of liquidated damages with interest as prayed. I also order that the said property be transferred to the plaintiff within 3 months and costs.

Order accordingly.

Solicitors: *Sethu, Ghazali & Gomez; Kadir, Tan & Ramli.*

KANIAMMAL v. MOHAMED HANIFFA

[O.C.J. (Arulanandom J.) May 5, 1980 & April 13, 1981]
[Penang — Civil Suit No. 717 of 1976]

Practice and Procedure — Defence — Application for defence to be struck out — Triable issues of fact and law — Application disallowed.

This was an application to strike out the defence of the defendant on the grounds that it disclosed no reasonable answer or defence to the plaintiff's claim, in law and in fact. The suit was first commenced against the defendant/respondent by one Minachi for an injunction restraining him from residing or remaining on land and premises known as Lot 1139 together with premises No. 3 Kampong Herriet and damages and costs. After the death of the original plaintiff, the present plaintiff was substituted with the leave of court as plaintiff and the sole executrix of the original plaintiff's will.

Held, dismissing the application: there were issues both of fact and law and this was not a case where the defence should be struck out or the defendant allowed to defend only on payment of a sum of money into court.

CIVIL SUIT.

R. Rajasingam for the applicant.

S.P. Annamalai for the respondent.

Arulanandom J.: This was an application by the applicant for the following orders against the respondent: —

"(1) For an Order that the defence of the defendant abovenamed in this action be struck out and for judgment to be entered forthwith for the plaintiff abovenamed in terms of the plaintiff's claims as set forth in the Statement of Claim herein with costs, on the grounds that the said defence of the defendant discloses no reasonable answer or defence at all to the plaintiff's claims herein, in law and in fact;

(2) In the alternative, for an Order that on the defendant paying into court within seven (7) days from the date of the Order to be made hereon, the sum of $6,300, being the alleged monthly rentals of the said premises No. 3, Kampong Herriet, Penang, the subject-matter of the action herein, from July 16, 1972 to date at the alleged rate of $70 a month, the defendant be allowed to defend the action herein and an early date of hearing be fixed therefor; but on the defendant failing to do so within the said seven (7) days from the date of the Order to be made hereon, then immediately thereafter, judgment be entered for the plaintiff as claimed in the Statement of Claim herein, with costs."

The suit was first commenced against the respondent by one Minachi @ Sinnammal d/o Supparayan alias S. Sinnammal a/p Suparayan deceased for an injunction restraining him from residing or remaining on land and premises known as Lot 1139 Town Subdivision 4, N.E.D. of Penang together with premises No. 3 Kampong Herriet and Damages and Costs. After the death of the original plaintiff, the present plaintiff was substituted with the leave of the court as plaintiff and the sole executrix of the original plaintiff's Will.

The defendant filed a defence to the action and the plaintiff filed a reply.

The latest affidavit the plaintiff relies on in support of her application was filed on April 3, 1980. And in resisting the application the defendant relies on his affidavit of April 30, 1980.

In considering the averments in both the affidavits it is clear that there are certain important questions to be determined before an order in terms of the application can be given without hearing evidence.

Firstly: Is the defendant's occupation of the premises by licence or by a tenancy?

Secondly: Was there a valid notice to quit? — There was no notice to quit before the court.

Thirdly: Was there any oral agreement between the original plaintiff and the defendant?

Fourthly: Is there any substance in the defendant's allegation that the plaintiffs are reluctant to bring the matter for trial, are deliberately delaying the trial and hoping to evict him by judgment without trial?

The court was of the opinion that there were issues both of fact and law and that this was not a case where the defence should be struck out or the defendant allowed to defend only on payment of a sum of money into court.

For these reasons the application was dismissed with costs.

Application dismissed.

Solicitors: *R. Rajasingam & Co.; Annamalai & Co.*

LIM GAIT TONG v. PENINSULAR LAND DEVELOPMENT BHD. & ANOR.

[O.C.J. (Arulanandom J.) March 24; July 7, 1980 & April 13, 1981]

[Penang — Civil Suits Nos. 82, 83 & 19 of 1969]

Practice and Procedure — Application to strike out suits for want of prosecution — Ten years' delay — Witnesses unavailable — Application allowed.

The three applications to strike out suits were brought by the same respondent against the different applicants for want of prosecution. It was agreed that as the grounds of applications were the same, application in Civil Suit 83/69 would be heard and the other two applications would abide by the decision in the application.

The respondent was an undischarged bankrupt. He was made bankrupt in 1969. On August 5, 1976, over 7 years after the commencement of these civil suits by the respondent, Messrs. Shearn, Delamore & Co. was granted permission to act on behalf of the Official Assignee to continue the said civil suits in the High Court at Penang. On July 19, 1977, over eight years after the commencement of the said civil suits, Messrs. Shearn, Delamore & Co. informed the applicants that they had notified the Registrar to proceed to fixing of the cases for hearing. Nothing else happened until January 3, 1980 when a Notice was issued under Order 64 r. 13 of the intention to proceed. The three main witnesses for the applicants were then no longer available to give evidence.

Held, allowing the application: through the inordinate delay of over ten years important and indispensable witnesses for the applicants on whom they had to lean very heavily to support their cases had been made unavailable for their defences. For the applicants to prosecute their cases without these witnesses would be to put on them a burden which they, through no fault of their own, will be unable to discharge. For the court to place such a burden on them would be a gross travesty of justice. The suit were therefore dismissed with costs for want of prosecution.

CIVIL SUIT.

T.R. Hepworth for the defendants/applicants.

C. Abraham for the plaintiff/respondent.

Arulanandom J.: These three applications were before the court at the same time and they were all applications to strike out suits brought by the same respondent against the different applicants for want of prosecution.

It was agreed that as the grounds of applications were the same application in Civil Suit 83/69 would be heard and the other two applications would abide by the decision in the application.

As the respondent was an undischarged bankrupt and as the Official Assignee was not before the court, Mr. R. Khoo of Shearn, Delamore & Co. was allowed to appear as *amicus curiae.*

The applicants' application was supported by the affidavit of T.R. Hepworth affirmed on February 8, 1980. In it the deponent averred *inter alia* that (i) the respondent was adjudicated a bankrupt in August 1969; (ii) on August 5, 1976 over seven years after the commencement of these civil suits by the respondent the Attorney General Malaysia in accordance with section 61(c) of the Bankruptcy Act (Act 55/1967) granted permission to the Official Assignee to employ Messrs. Shearn, Delamore & Co. to act on behalf of the Official Assignee to continue the said civil suits in the High Court at Penang; (iii) On July 19, 1977, over eight years after the commencement of the said civil suits, Messrs. Shearn, Delamore & Co. informed the solicitors of the applicants that they had notified the Registrar to proceed to fixing of the cases for hearing.

(iv) Nothing else happened until January 3, 1980 when a Notice was issued under Order 64 rule 13 of the intention to proceed, but still no application to substitute the Assistant Official Assignee as plaintiff in place of the respondent under Order 17 rule 4.

(v) By now three of the applicants' most important witnesses viz. (a) Johnny Heah the architect in respect of the developments which were the subject-matter of the contracts referred to in Civil Suit 19/69 had left the country to reside permanently in Canada; (b) F.E. Brunton, defendant in Civil Suits 82/69 and 83/69 had left the country; and (c) Messrs. Norman Lehey & Associates the firm of architects involved in the development was no longer in existence and hence all three were not available to give evidence and a fourth Sonny Soon, Assistant Secretary of the Company involved was no longer in their service.

The deponent deposed that the delay in prosecuting the cases was inordinately long and inexcusable and there was a grave risk that a fair trial